Supreme Court, U.S.
FILED
DEC 12 2002
OFFICE OF THE CLERK

(4)

No. 02-527

IN THE
Supreme Court of the United States

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, *et al.*,

Petitioners,

v.

JOE ALLBAUGH, Director, Federal Emergency Management Agency, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia

BRIEF OF THE STATES OF MARYLAND, COLORADO, MAINE, MINNESOTA, MISSOURI, MONTANA, NEVADA, NEW JERSEY, NEW MEXICO, OREGON, WASHINGTON, AND WEST VIRGINIA, AND THE TERRITORY OF THE VIRGIN ISLANDS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

ANDREW H. BAIDA*
Solicitor General

EDWARD S. HARRIS
Assistant Attorney General
707 North Calvert Street
Baltimore, Maryland 21202
(410) 545-0050

Counsel for *Amici* States

**Counsel of Record* [additional counsel listed on inside cover]

16 pp

KEN SALAZAR
Attorney General of Colorado
1525 Sherman Street
Denver, CO 80203

G. STEVEN ROWE
Attorney General of Maine
6 State House Station
Augusta, ME 04333

MIKE HATCH
Attorney General of Minnesota
102 State Capitol
75 Dr. Martin Luther King, Jr. Blvd
St. Paul, MN 55155-1609

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
Supreme Court Building
207 West High Street
Jefferson City, MO 65101

MIKE MCGRATH
Attorney General of Montana
Justice Building
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

FRANKIE SUE DEL PAPA
Attorney General of Nevada
100 N. Carson St.
Carson City, NV 89701-4717

JOHN J. FARMER, JR.
Attorney General of New Jersey
25 Market Street, CN 080
Trenton, NJ 08625

PATRICIA A. MADRID
Attorney General of New Mexico
P.O. Drawer 1508
Santa Fe, NM

HARDY MYERS
Attorney General of Oregon
1162 Court St. NE
Salem, OR 97310

IVER A. STRIDIRON
Attorney General of the Virgin Islands
48B-50C Kronprindsens Gade
St. Thomas, U.S. VI 00802

CHRISTINE O. GREGOIRE
Attorney General of Washington
P.O.Box 40100
1125 Washington St.
Olympia, WA 98504

DARRELL V. MCGRAW
Attorney General of West Virginia
State Capitol, Room 26-E
Charleston, WV 25305

QUESTION PRESENTED

Does the President have the authority, by executive order, to preclude a State from utilizing a pre-hire labor agreement as a bid specification in all federally assisted State construction contracts, without regard to the State's circumstances, when Congress has authorized both the type of specification and the ability of the federal-aid agency to review specifications on a contract-by-contract basis?

TABLE OF CONTENTS

Page

QUESTION PRESENTED.....i

INTEREST OF *AMICI CURIAE*.....1

REASONS FOR GRANTING REVIEW.....2

I. THE DECISION BELOW AFFECTS SIGNIFICANT STATE PROCUREMENT INTERESTS AND IS INCONSISTENT WITH THE CONGRESSIONALLY ESTABLISHED SCHEME FOR OVERSIGHT OF FEDERALLY ASSISTED STATE PROJECTS.....3

II. A POLICY-BASED BAN ON PLA SPECIFICATIONS WITHOUT REGARD TO CIRCUMSTANCES IS REGULATORY ACTION THAT IS PREEMPTED BY THE NLRA.....5

A. The Executive Order constitutes regulatory action.....5

B. The Executive Order is subject to NLRA preemption.....7

CONCLUSION.....11

TABLE OF AUTHORITIES

Page

CASES:

Building and Construction Trades Council v. Associated Builders and Contractors, 507 U.S. 218 (1993).....3, 6, 9, 10

Cardinal Towing v. City of Bedford, Texas, 180 F.3d 686 (5th Cir. 1999).....6

Chamber of Commerce v. Reich, 74 F.3d 1322 (D.C. Cir. 1996).....6, 7, 8

Connell Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 633 (1975).....9

Dillingham Const. N.A., Inc. v. County of Sonoma, 190 F.3d 1034 (9th Cir. 1999).....6

N.L.R.B. v. Denver Bldg. & Const. Trades Council, 341 U.S. 675 (1951).....1

Petrey v. City of Toledo, 246 F.3d 548 (6th Cir. 2001).....6

San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).....8

Sprint Spectrum L.P., v. Mills, 283 F.3d 404 (2nd Cir. 2002).....6

Wisconsin Dept. of Industry v. Gould, Inc., 475 U.S. 282, 289 (1986).....5

STATUTES:

23 U.S.C.

§ 106(a)(1).....3

§ 109.....3

§ 114(a).....4

29 U.S.C.

§ 151.....3

§ 158(e).....8

Pursuant to Sup. Ct. R. 37, the signatory States respectfully submit this brief as *amici curiae* in support of petitioners.

INTEREST OF *AMICI CURIAE*

The States have a distinct and substantial interest in the outcome of this case. Executive Order 13202's blanket prohibition against the States' use of a pre-hire labor agreement as a bid specification in all federally assisted construction contracts strips the States of a valuable labor relations tool in managing and implementing billions of dollars of transportation, housing, and other State-sponsored projects.

Such an agreement, known more commonly as a Project Labor Agreement (PLA), has become an important vehicle for labor relations management on public projects. PLAs ameliorate the frictions identified by this Court in *N.L.R.B. v. Denver Bldg. & Const. Trades Council*, 341 U.S. 675 (1951), that can arise where union and non-union workers may be working at the same site. They bring stability and predictability to the execution of the work ensuring continuation of work when local bargaining strikes occur, and they assure an adequate supply of skilled labor to perform the work competently and expeditiously.

A case-by-case analysis is always necessary, however, to determine a PLA's utility for any given project, as PLAs are neither always good for a project, as enthusiastic proponents often contend, nor are they always bad, as the Executive Branch has concluded by the issuance of the Executive Order. Rather, their use is driven by a number of factors, including the strength of the labor movement in the project's locale, the history of labor

disputes, the availability of an adequate supply of skilled labor, the timetable for the project, and the presence or absence of PLAs on neighboring projects.

With the stroke of a pen, however, this important instrument for labor relations stability has been stricken from the project management options open to the States. In this case, the United States Department of Transportation mechanistically applied Executive Order 13202 ("Executive Order") to deny the use of a PLA, which had been the object of months of study and comprehensive analysis by the State of Maryland's construction manager, for replacement of the Woodrow Wilson Memorial Bridge ("Wilson Bridge"). On a broader level, the Executive Branch has nullified the States' ability to even consider a PLA in its choice of options when determining, in the circumstances of the particular federally assisted project at issue, the most effective manner for implementing that contract.

Federal aid to State projects is important, but the burden of actually carrying out the work is shouldered by the States alone. Except as the States may be constrained by Congress, they are entitled to employ all the means at their disposal to manage State-owned federally assisted contracts in accordance with performance standards set by State law. Review is warranted because the Executive Order unlawfully limits those means.

REASONS FOR GRANTING REVIEW

The petition should be granted because the Court of Appeals' decision subjects State-owned contracts to broad policy-based restrictions that are inconsistent with federal law and this Court's decisions. By affirming the Executive Order, the D.C. Circuit has acted in total disregard of the contract-by-contract approval of State specifications provided for by Title 23 of the United States Code, and the

right of States to employ PLAs under the National Labor Relations Act ("NLRA"), 29 U.S.C. §151 et. seq. as interpreted by the Court in *Building and Construction Trades Council v. Associated Builders and Contractors*, 507 U.S. 218 (1993) (*Boston Harbor*).

I. THE DECISION BELOW AFFECTS SIGNIFICANT STATE PROCUREMENT INTERESTS AND IS INCONSISTENT WITH THE CONGRESSIONALLY ESTABLISHED SCHEME FOR OVERSIGHT OF FEDERALLY ASSISTED STATE PROJECTS.

The State procurement contracts for the replacement of the Wilson Bridge are illustrative of the federal oversight regulatory scheme that preserves the States' vital project-management interests in the design, procurement and ultimate construction of their important projects. The Wilson Bridge project involves a number of substantial federal aid highway contracts estimated at one billion dollars. After months of study and deliberation with the State, Maryland's construction manager negotiated a PLA in accordance with federal law.

Pursuant to Title 23 of the United States Code, a State must "submit to the Secretary for approval such plans, specifications, and estimates for each proposed project as the Secretary may require." 23 U.S.C. § 106(a)(1). Design and other standards are established by 23 U.S.C. § 109.[1] For highways, "construction work and labor in each State shall be performed under the direct supervision of the State

---

[1] Consistent with this statutory guidance, the Secretary of Transportation has promulgated detailed regulations at Title 23 of the Code of Federal Regulations.

transportation department and in accordance with the laws of that State and applicable Federal laws." 23 U.S.C. § 114(a). Congress has thus recognized the primary responsibility for managing the work and the labor lies with the States and that approval of proposed projects in federally assisted procurements is to be carried out on an individualized basis.

Conversely, Congress has failed to enact any law that remotely authorizes the federal government to establish the type of blanket prohibition that the Executive Order imposes with respect to the use of PLAs as a means of managing a federally assisted project. The Court of Appeals concluded that no specific congressional authorization for the Executive Order was required because the order is qualified by the phrase "to the extent permitted by law." App. 7a. While the court suggested three types of litigation that may be available to protect the States in the event the federal approval authority follows the President's order in a manner not permitted by law, this suggestion ignores the States' ownership interest in the affected contract and Congress' demonstrated understanding that federal oversight is to be exercised with respect to the States' administration of each federal aid contract and its unique components.

Neither the federal grant of funds nor the Executive Order's broad limitations on State procurement policy in any way lessen or remove the primary responsibility that Congress has imposed on the States to perform and be accountable for the timely completion of State projects, and to make other procurement decisions consistent with their best judgment and State law. In the federal aid construction setting, Congress has placed that responsibility squarely upon the States as the agencies on the front line, presumably because of their greater and more detailed knowledge of the particular needs of the procurement. By unilaterally

subjecting all State procurements to a single standard, regardless of the source, amount, or purpose of the federal funds that are the vehicle for the restriction, the Executive Order improperly overrides Congress' understanding that the States are to be provided the opportunity to establish specifications for each particular federally assisted project.

II. A POLICY-BASED BAN ON PLA SPECIFICATIONS WITHOUT REGARD TO CIRCUMSTANCES IS REGULATORY ACTION THAT IS PREEMPTED BY THE NLRA.

A. The Executive Order constitutes regulatory action.

The Court of Appeals' standard merits review because it conflicts with this Court's decisions by expanding the zone of "proprietary" conduct to embrace any condition imposed in the exercise of the spending power as long as it only affects conduct of the government contractor in the performance of the government contract. The D.C. Circuit held the Executive Order "clearly constitutes proprietary action rather than regulation" (App. 10a) because "the Government unquestionably is the proprietor of its own funds, and when it acts to ensure the most effective use of those funds, it is acting in a proprietary capacity." App. 11a. This Court has made it clear that concluding a government condition is proprietary "simply because it operates through [government] purchasing decisions . . . would make little sense." *Wisconsin Dept. of Industry v. Gould, Inc.*, 475 U.S. 282, 289 (1986).

The Court of Appeals erred in concluding that the Executive Order's directive on PLAs was "proprietary" in nature and thus not subject to NLRA preemption because it does not have the effect of "regulating within a protected

zone." *Boston Harbor*, 507 U.S. at 227. The test that the court applied to conclude that "Executive Order 13202 clearly constitutes proprietary action rather than regulation" (App. 10a) is contrary to the standard set by this Court. The court stated, "[a] condition that the Government imposes in awarding a contract or in funding a project is regulatory *only* when, as the Supreme Court explained in *Boston Harbor*, it 'addresse[s] employer conduct unrelated to the employer's performance of contractual obligations to the [Government].'" App. 13a (quoting *Boston Harbor,* 507 U.S. at 228) (emphasis added). This Court has never held that the *only* government purchasing conditions that are regulatory are those that affect employer conduct unrelated to the performance of its contractual obligations to the government.

The scope of regulatory conduct is much broader and includes purchasing restrictions that are "'tantamount to regulation' or policymaking." *Boston Harbor*, 507 U.S. at 229. Thus, a State's bid specification "specifically tailored to one particular job" constitutes proprietary conduct, *id.* at 232, but a universal purchasing standard reflecting a general labor policy choice of the Executive to be implemented across the entire federal assistance structure can only be regulation.

The Court of Appeals' opinion not only misinterprets this Court's decisions but also ignores its own prior precedent and, by doing so, has placed its standard in direct conflict with the other circuits that have decided this question. *See Dillingham Const. N.A., Inc. v. County of Sonoma*, 190 F.3d 1034 (9th Cir. 1999), *Cardinal Towing v. City of Bedford, Texas,* 180 F.3d 686 (5th Cir. 1999); *Petrey v. City of Toledo,* 246 F.3d 548 (6th Cir. 2001); *Sprint Spectrum L.P., v. Mills,* 283 F.3d 404 (2nd Cir. 2002). In *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir.

1996), for example, the court termed an Executive Order, which barred government contracts to contractors that use strike breakers, as one seeking "to set a broad policy governing the behavior of thousands of American companies and affecting millions of American workers. . . . It cannot be equated to the ad hoc contracting decision made by [the State] in seeking to clean up Boston Harbor." *Id.* at 1337. The Executive Order at issue in this case imposes a substantively indistinguishable broad policy that affects all federally assisted projects.

By draping the Executive Order's ban on PLAs in proprietary cover, the Court of Appeals has improperly disregarded this Court's decisions and the individualized decision-making process contemplated by Congress. A State cannot require a PLA on all construction projects, without regard to the circumstances, because such an approach would be regulatory under *Boston Harbor* and therefore preempted by the NLRA. Likewise, an executive order that eliminates the ability of the State to utilize a PLA specification without regard to circumstances is regulatory *and* an unjustified expansion of executive authority into an arena acted upon by Congress. A proprietary decision can only be made by considering the unique circumstances of each particular project. The fiat approach of the Executive Order is, by its very nature, regulatory.

B. The Executive Order is subject to NLRA preemption.

The NLRA preempts the Executive Order's policy-based ban on the States' use of PLAs in federally assisted projects because the Executive Order interferes directly with rights that the NLRA gives to owners and construction managers. Where state and local regulation interferes with the "integrated scheme of regulation" established by

Congress in Sections 7 and 8 of the NLRA, that interference is pre-empted. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). Preemption also applies to regulation by the Executive Branch through the device of the Executive Order. *Chamber of Commerce v. Reich*, 74 F.3d at 1334.

In the special context of PLAs, the Executive Order interferes with rights given to owners and construction managers by the NLRA. The construction industry proviso to Section 8(e) of the NLRA protects the right of construction industry employers and unions to enter into restrictive subcontracting agreements for work to be done at the site of construction.[2] This Court has interpreted the proviso to protect agreements that are negotiated in the context of a collective bargaining relationship between the

---

[2] § 8(e). Codified at 29 U.S.C. § 158(e), provides in relevant part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from . . . doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work.

employer and the union(s) and "possibly...common situs relationships on particular jobsites as well." *Connell Co. v. Plumbers & Steamfitters Local 100* , 421 U.S. 616, 633 (1975) (referring to project sites with both union and non-union workers). PLAs thus qualify as Section 8(f) "pre-hire" agreements because they are negotiated for, and addressed to the circumstances of, particular project job sites. PLAs are particularly useful when, among other circumstances, union members "would be employed alongside nonunion subcontractors" and, thus, are addressed to the common situs problem contemplated by *Connell. Id.* at 631.

A State's construction manager is eligible and entitled under Section 8(e) to negotiate a PLA as "an employer engaged in the construction industry." Indeed, as this Court stated in *Boston Harbor*, "[t]o the extent that a private purchaser may choose a contractor based upon that contractor's willingness to enter into a pre-hire agreement, a public entity as a purchaser should be permitted to do the same." *Boston Harbor*, 507 U.S. at 231. Nevertheless, the Executive Order operates to prevent the entire class of public project construction managers from exercising their statutory entitlement.

As a result, only a contractor-by-contractor option is available under the Executive Order. Under State competitive bidding schemes, contract conditions are set for all contractors by the State bid specifications, which are the only vehicle for project-wide application of any project conditions, including a PLA. The Executive Order forbids both the States and their construction managers, however, from making such agreements and incorporating them into their project bid specifications.

The Executive Order forbids the opportunity for the construction manager to make even a voluntary decision (or to make a recommendation, like the construction managers did in *Boston Harbor* and in the Woodrow Wilson Bridge project) that there should be a PLA on the project. The Executive Order's blanket edict prohibits the State from doing so, without regard to the particular needs or circumstances prevailing at the project, and thus effectively negates the potential for any PLA to be applied to any project receiving federal funds.

The consequence of this total ban on a State's ability to apply a PLA to any federally assisted project flies in the face of this Court's endorsement of public owners' equal footing with private owners. The Executive Order therefore directly interferes with the rights established by the NLRA and prohibits "the very sort of labor agreement that Congress explicitly authorized [in §§ 8(e) and (f)] and expected frequently to find." *Boston Harbor*, 507 U.S. at 233. The Executive Order is invalid because the effect of its "denying an option to public owner-developers that is available to private owner-developers itself places a restriction on Congress' intended free play of economic forces identified in *Machinists*." *Id.* at 232. The President has no authority to impose such a restriction.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

ANDREW H. BAIDA*
Solicitor General

EDWARD S. HARRIS
Assistant Attorney General
707 North Calvert Street
Baltimore, Maryland 21202
(410) 545-0050

Counsel for *Amici* States

**Counsel of Record*

December 12, 2002